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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 560

ARNOLD CONSTABLE CORPORATION,
Petitioner,

v.

EUDOWOOD SHOPPING CENTER, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

NORMAN P. RAMSEY,
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Baltimore, Maryland 21202,
Counsel for Petitioner.

The Daily Record Co., Baltimore, Md. 21203

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ------

ARNOLD CONSTABLE CORPORATION,
Petitioner,

v.

EUDOWOOD SHOPPING CENTER, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner prays that a writ of certiorari issue to review the order of the Court of Appeals of Maryland, which dismissed Petitioner's appeal, entered in the above-entitled case on May 27, 1968.

Citations to Orders Below

The Court of Appeals of Maryland has not rendered any opinions in the above-entitled case. Its order granting Respondent's motion to dismiss Petitioner's appeal is printed in Appendix B hereto, *infra*, p. 5a. Its order denying Petitioners motion to reconsider order of dismissal, or in the alternative, to rescind order of dismissal, is printed in Appendix B, p. 5a.

Jurisdiction

The order of the Court of Appeals of Maryland was entered on May 27, 1968, Appendix B, p. 5a. Rehearing was denied on June 27, 1968. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(3).

Questions Presented

(1) Where an appellant under Maryland law *must* file the record with the *clerk* of the *lower court* to initiate an appeal, can the State of Maryland, having afforded litigants the right to appeal to a higher court, constitutionally under the 14th Amendment deny a litigant that right because of alleged failure timely to transmit the record, when that failure is due to the neglect and omission of the State's own lower court clerk?

(2) Can the Court of Appeals of Maryland constitutionally under the 14th Amendment deny Petitioner its right to appeal when there is no evidence whatever supporting its holding that the one-day delay in transmitting the record was not due to the "neglect, omission or inability of the clerk of the lower court", (a circumstance that requires the Court under the Maryland Rules of Procedure to reinstate the appeal)?

(3) Under the foregoing circumstances, is the refusal of the Maryland Court of Appeals to extend to Petitioner the remedy of reinstating its appeal (as it has done in the past for all other appellants in reported cases similarly aggrieved by error or omission of the lower court clerk), a denial of due process and equal protection of the laws under the 14th Amendment?

Constitutional Provisions and Statutes Involved

The constitutional provision involved is the United States Constitution, 14th Amendment, printed in Appendix A,

infra, p. 1a. The statutory provisions involved are Article 5, Section 1, Annotated Code of Maryland (1957 ed. 1968 Replacement Vol.) and Maryland Rules of Procedure, Rules 825 and 835, printed in Appendix A, pp. 1a-4a.

Statement of Case

This proceeding involves a suit by Respondent for substantial money damages arising out of the alleged breach by Petitioner as tenant of a long-term shopping center lease, which shopping center was owned and operated by Respondent. On January 24, 1968, judgment was entered, after trial, in the Superior Court of Baltimore City in favor of Respondent and against Petitioner for $327,831.97 with interest from January 15, 1968 and costs of suit.

Thereafter, on February 7, 1968, Petitioner caused an appeal to be taken from said judgment to the Court of Appeals of Maryland and filed a supersedeas bond for $350,000 with the Superior Court of Baltimore City.

This appeal was dismissed by order of the Court of Appeals on May 27, 1968 (Appendix B, p. 5a) because of an asserted failure by Petitioner to make a timely filing of the record with the Court of Appeals. Rule 825 of the Maryland Rules of Procedure provides that the record must be filed with the Court of Appeals within thirty days after an appeal is taken. The rules require that the record be filed by the clerk of the *trial* court who is to be furnished with the record by the Appellant and his counsel, and that the *lower* court may extend the time for transmitting the record for a period not exceeding ninety days from the date the appeal was taken.

Orders extending Petitioner's time issued out of the lower court, with the 90th day expiring on May 7th.

Appellant filed the record with the lower court clerk on May 7, 1968 but that official for his own convenience, only lodged it with the Court of Appeals on May 8, 1968 — one day after the 90th day from the date the appeal was taken. The lower court clerk could have complied with the Rules by personal delivery of the record to the appellate tribunal on that day, or by mailing the record as permitted by Rule 825 (e). He did neither.

Petitioner then filed a motion to extend time with the Court of Appeals pursuant to Maryland Rule 825 (Appendix B, pp. 1a-3a). Attached to the motion were the affidavits of Frank L. Ensor, Assistant Chief Clerk of the Superior Court of Baltimore City, and Cleaveland D. Miller, one of the Petitioner's attorneys. The affidavits are printed in Appendix C, pp. 6a-9a, and clearly showed, in the language of Rule 825, that the critical one-day delay was solely due to the "neglect, omission or inability of the Clerk of the lower court". This motion was denied by the Court of Appeals, and Respondent's simultaneous motion to dismiss was granted, on May 27, 1968 (Appendix B, p. 5a).

Thereafter, Petitioner filed a motion with the Court of Appeals to rescind that Court's order of dismissal, or in the alternative, for rehearing. In paragraph 6 of that motion Petitioner stated:

> "With all deference to this Court, it is respectfully submitted that a rejection of appellant's [Petitioner's] application to reinstate its appeal herein would, under the circumstances here presented, quite possibly constitute a denial of due process of law within the meaning of the 14th Amendment of the Constitution of the United States. Unless the appeal herein is reinstated, appellant, a New York Corporation, licensed to do business in the State of Maryland, will have been deprived of its appellate remedy by miscarriage in the internal

> operations of the judicial machinery of the State of Maryland. Appellant itself has done nothing whatever to prejudice its standing before the Maryland courts; it has been cast out of court by the action (and inaction) of others." (R. 20-21).

This motion was denied by the Court of Appeals, without hearing or opinion, by order dated June 27, 1968.

Reasons for Granting the Writ

1. The action of the Court of Appeals of Maryland in dismissing Petitioner's appeal for failure to make a timely filing of the record, in the circumstances here involved, amounts to a taking of Petitioner's property without due process of law, in violation of the 14th Amendment of the United States Constitution.

Article 5, Section 1 of the Annotated Code of Maryland (1957 ed., 1968 Replacement Vol.) states that:

> "Any party may appeal to the Court of Appeals from any final judgment or determination of a court of law in any civil suit or action * * *."

Having granted a right of appeal, Maryland has incorporated the appellate procedure in its judicial process and the appellate procedure "cannot be conducted so as to deny that 'due process' which the Fourteenth Amendment requires." *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 45, 75 S. Ct. 92, 97 (1954) (Black, J., dissenting). And see, *Frank v. Magnum*, 237 U.S. 309, 327, 35 S. Ct. 582, 587 (1915):

> "And while the 14th Amendment does not require that a state shall provide for an appellate review in criminal cases * * *, it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of

law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment."

The uncontroverted facts in this case, as outlined in the affidavits of lower court clerk Ensor and Miller, show that the fatal one-day delay was caused by the neglect, omission or error on the part of the clerk of the lower court and, therefore, by miscarriage in the internal operations of the judicial machinery of the State of Maryland, which Petitioner was required to employ under Maryland law. The affidavit of Clerk Ensor, which was never contradicted in any respect by Respondent, shows that Petitioner's counsel had done everything required to make the record ready for transmittal to the Court of Appeals by May 7, 1968 and that they had done everything required of them in time for the record to be transmitted in proper time, Appendix C, p. 7a. Nevertheless, the lower court clerk transmitted the record on May 8, 1968 — a day too late — only because he wanted to "kill two birds with one stone" by sending the record in this case from his Baltimore office to the Court of Appeals in Annapolis at the same time he sent a record to the Court of Appeals in another case. Actually, his mere mailing of the record on May 7th would have complied with the Rules.

The refusal of the Court of Appeals to hear this appeal on the merits, when the failure to file the record in time was due to the neglect, omission and error of the state court clerk is a denial of due process within the meaning of the 14th Amendment.

2. The only evidence before the Maryland Court of Appeals herein is that the one-day delay (beyond the 90-day limit) in filing the record with that court was entirely due

to the "neglect, omission or inability of the clerk of the lower court".

Rule 825 (d) of the Maryland Rules of Procedure states:

> "An appeal *shall not* be dismissed because the record has not been transmitted within the time prescribed, if it appears to this Court that such delay was occasioned by the *neglect, omission or inability* of the clerk of the lower court, the court stenographer or appellee; provided, however, that such neglect, omission or inability shall not be presumed but must be shown by the appellant." (Emphasis added.)

This provision appears to be mandatory and, indeed, has been so recognized by Respondent. See, Answer to Appellant's Motion to Reconsider Order of Dismissal, etc., R. 29. It has generated a long line of decisions of the Maryland Court of Appeals all holding that a delay in transmitting the record on appeal, occasioned by mistake or miscarriage of a clerk, will not deprive a litigant of his right to appeal—See, *e.g., Freeman v. Stanbern Construction Co.*, 205 Md. 71, 106 A. 2d 50 (1954) (delay due to clerk's good-faith but erroneous belief that record could not be transmitted before appeal bond filed); *Lewin v. Simpson*, 38 Md. 468 (1873) (delay due to clerk's having misplaced papers); *Oxenham v. Mitchell*, 160 Md. 269, 153 A. 71 (1931); *Ellinger v. Baltimore City*, 90 Md. 696, 45 A. 884 (1900) (affidavit of clerk exonerated appellants from default in delay in absence of other evidence).

However, in this case the Court of Appeals ignored these earlier cases and disregarded the uncontroverted evidence that the delay in filing the record was due to the error and omission of Clerk Ensor. The latter's affidavit was never controverted by Respondent and constitutes the entire record with the sole exception of the Miller affidavit. The Court of Appeals' disregard of the Ensor affidavit presents

this Court with a situation analogous to that found in *Thompson v. Louisville*, 362 U.S. 199, 80 S. Ct. 624 (1960). There this Court reversed the conviction of petitioner on loitering and disorderly conduct charges on the ground that the conviction deprived him of liberty without due process in that there was no evidence to support a finding of guilt. Mr. Justice Black, speaking for the Court, reviewed the record, agreed it was devoid of evidence supporting the charges, and stated:

> "Just as 'Conviction upon a charge not made would be sheer denial of due process', so is it a violation of due process to convict and punish a man without evidence of his guilt." 362 U.S. at 206, 80 S. Ct. at 629.

Accord, *Garner v. Louisiana*, 368 U.S. 157, 82 S. Ct. 248 (1961); *Shuttlesworth v. Birmingham*, 382 U.S. 87, 86 S. Ct. 211 (1965). And see, *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297, 84 S. Ct. 1302, 1308 (1964), where the Court said:

> "The consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense."

So, too, the failure to recognize substantial and real compliance with procedural rules may result in a denial of due process.

Here, there is no evidence in the record to support the holding of the Court of Appeals, implicit in its dismissal of Petitioner's appeal, that the delay in transmitting the record was not due to the error and omission of the lower court clerk. This circumstance, therefore, amounts to a denial of due process.

3. Under the foregoing circumstances, the refusal of the Maryland Court of Appeals to entertain this appeal on the

merits is also a denial of equal protection of the laws under the 14th Amendment. By invoking a claimed denial of due process of law in its motion to rescind denial addressed to the Maryland Court of Appeals (see pp. 4-5, *supra*), Petitioner preserved for review in this Court the issue of equal protection, since due process of law has been described as including equal protection of the laws, operating on all alike without discrimination. See *Duncan v. Missouri*, 152 U.S. 377, 382, 14 S. Ct. 570, 572 (1894). Even under the 5th Amendment, silent as it is as to equal protection of the laws, "arbitrary discrimination between persons in similar circumstances would violate the due process clause. . . ." *Wallace v. Currin*, 95 F. 2d 856, 867 (4th Cir. 1938), *aff'd*, 306 U.S. 1, 59 S. Ct. 379 (1939). "Indeed, it [equal protection] has frequently been said to be essential to due process of law * * *." *Pfeiffer Brewing Co. v. Bowles*, 146 F. 2d 1006 (Emer. Ct. App. 1945).

As has been demonstrated above, Maryland has provided an ameliorative rule in 825 (d) of the Maryland Rules of Procedure, which specifically mandates that neglect, omission or inability of the lower court clerk shall not result in dismissal of an appeal. Also as has been shown above, the Maryland Court of Appeals itself has exercised its powers under this rule to preserve the rights of appellants in the past. Yet in the instant case, the Maryland Court of Appeals has, without any evidentiary basis, and in a holding that can only be described as wholly arbitrary, dismissed Petitioner's appeal. Thus Petitioner, a corporation foreign to Maryland, has been denied equal protection of the laws. In *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 239, 77 S. Ct. 752, 756 (1957), the Court reversed Bar Examination Board's refusal to admit plaintiff to practice of law, saying:

"Even in applying permissible standards officers of a State cannot exclude an applicant where there is *no basis for their finding* that he fails to meet these standards, *or when their action is invidiously discriminatory.*" (Emphasis supplied.)

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

NORMAN P. RAMSEY,

Counsel for Petitioner.

September 24, 1968.

APPENDIX A

(CONSTITUTIONAL AND STATUTORY PROVISIONS CITED AND QUOTED)

United States Constitution, 14th Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 5, Section 1, Annotated Code of Maryland (1957 ed. 1968 Replacement Vol.)

Any party may appeal to the Court of Appeals from any final judgment or determination of a court of law in any civil suit or action, including a mandamus action, or in any prosecution for the recovery of any penalty or fine or damages; provided, however, that this section shall not be construed to permit an appeal to the Court of Appeals from any judgment or determination entered by a court of law in the proper exercise of its jurisdiction on appeal from a justice of the peace, people's court or trial magistrate.

Maryland Rules of Procedure, Rule 825

Rule 825. Record — Time for Transmitting.

a. *Within Thirty Days.*

Within thirty days after the first order for appeal is filed or a writ of certiorari is granted unless a different

time shall be fixed by order entered pursuant to sections b and c of this Rule, the clerk of the court having possession of the record shall transmit it to this Court.

b. *Lower Court May Shorten or Extend Time.*

Upon application of any party and for sufficient cause shown, or upon its own motion, the lower court may, by order, shorten or extend the time for transmitting the record, if its order is made before the expiration of the period for transmitting the record as originally prescribed or as extended by a previous order; but the lower court shall not extend the time to a day more than ninety days from the date after the first order for appeal is filed or a writ of certiorari is granted.

c. *Court of Appeals May Shorten or Extend Time.*

Upon application of any party and for sufficient cause shown, or upon its own motion, this Court may direct that the record be transmitted within such shorter or longer period of time as may be ordered. Such an order will not be entered after the time for transmitting the record has expired unless it be shown that the failure to transmit the record was occasioned by the neglect, omission or inability of the clerk of the lower court, the court stenographer or appellee. An order of this Court entered pursuant to this section shall supersede and take precedence over any order of the lower court entered pursuant to section b of this Rule.

d. *Delay in Transmitting Due to Mistake.*

An appeal shall not be dismissed because the record has not been transmitted within the time prescribed, if it appears to this Court that such delay was occasioned by the neglect, omission or inability of the clerk of the lower court, the court stenographer or appellee; provided, however, that such neglect, omission or inability shall not be presumed but must be shown by the appellant.

e. *When Deemed Transmitted in Proper Time.*

The record shall be deemed to have been transmitted within the time permitted under section a or under an order entered pursuant to section b or c of this Rule if, before the expiration of the time limited for its transmission, (i) it shall have been delivered to the Clerk of this Court, or (ii) it shall have been deposited by the clerk of the lower court in the United States mail, as registered or certified mail, postage prepaid, return receipt requested, directed to the Clerk of this Court.

Maryland Rules of Procedure, Rule 835

Rule 835. Dismissal of Appeal.

a *By the Court.*

1. From *Pro Forma* Orders.

This Court will not entertain or consider an appeal taken from a *pro forma* order, judgment or decree, but will treat every such appeal as prematurely taken and will dismiss the same whenever it appears on the face of the record, or otherwise, that the appeal is from such *pro forma* order, judgment or decree.

2. Any Other Cause.

This Court may, on its own motion, dismiss an appeal for any cause set forth in section b of this Rule.

b. *On Motion.*

On motion filed by any party, an appeal may be dismissed for any one of the following reasons:

(1) The appeal is not allowed by law or by Rule 809 (Order Overruling Demurrer Not Appealable).

(2) The appeal has not been properly taken pursuant to Rule 811 (How Appeal to Be Taken).

(3) The order for appeal has not been filed with the lower court within the time prescribed by Rule 812 (Appeal — Time for Filing).

(4) The record has not been transmitted within the time prescribed by Rule 825 (Record — Time for Transmitting).

(5) The contents of the printed record extract do not comply with section b of Rule 828 (Part of Record to Be Printed — Printed Record Extract).

(6) A brief has not been filed by the appellant within the time prescribed by Rule 830 (Filing of Briefs).

(7) The size, style, format, readability or method of reproduction of a brief, appendix, or printed extract does not comply with section a of Rule 831 (Style and Contents of Brief).

(8) The case has become moot.

c. *Striking Out Order.*

If an appeal has been dismissed pursuant to subsection (4) or subsection (6) of section b of this Rule, the order dismissing the appeal may, upon motion filed within twenty days thereafter be rescinded if this Court be satisfied that the failure to transmit the record or to file a brief within the time prescribed by these Rules was unavoidable by reason of sickness or other sufficient cause. If an appeal has been dismissed pursuant to paragraph (7), the order dismissing the appeal may, upon motion filed within twenty (20) days thereafter, be rescinded if this Court be satisfied that a properly printed brief, appendix or printed extract will be filed within a time to be prescribed by this Court. In any such event, the case shall be reinstated on the Docket on such terms, including terms as to costs, as may be prescribed by this Court.

APPENDIX B

(ORDERS BELOW)

In The Court of Appeals of Maryland

No. 75

September Term, 1968

Arnold Constable Corporation,
Appellant,

v.

Eudowood Shopping Plaza, Inc.,
Appellee.

MOTION TO DISMISS APPEAL

(Filed May 16, 1968)

Eudowood Shopping Plaza, Inc., Appellee, by William J. Pittler and Sullivan & Pittler, its attorneys, moves, pursuant to Rule 835 b (4) of the Maryland Rules of Procedure, that the Appeal entered in the above captioned case be dismissed, and for reasons therefor, states:

* * * * * * *

Granted May 27, 1968.

/s/ HALL HAMMOND,
Chief Judge.

ORDER

Upon consideration of the motion to reconsider order of dismissal or, in the alternative, to rescind order of dismissal and answer filed thereto, it is this 27th day of June, 1968,

ORDERED by the Court of Appeals of Maryland that the motion to reconsider order of dismissal, or in the alternative, to rescind order of dismissal be, and it is hereby, denied.

/s/ HALL HAMMOND,
Chief Judge.

APPENDIX C

(AFFIDAVITS)

AFFIDAVIT OF FRANK L. ENSOR

1. I am employed by the Superior Court of Baltimore City as Assistant Chief Clerk, and my duties include assembling and transmitting to the Court of Appeals the records of cases which have been appealed to the Court of Appeals.

2. As part of my duties, I assembled the court file and trial exhibits in the case of Arnold Constable Corporation v. Eudowood Shopping Plaza, Inc., Court of Appeals No. 75, September Term, 1968.

3. The transcript of testimony was not originally a part of the records of the Superior Court of Baltimore City and was to be supplied to me by counsel for appellant.

4. On April 2, 1968 an Order of Court extending the time for transmitting the record to the Court of Appeals to May 10, 1968 was filed.

5. In reliance upon said Order and not realizing that said Order purported to extend the time of transmittal three days beyond the maximum period of time set by the Maryland Rules of Procedure, I requested Cleaveland D. Miller, one of the attorneys for Appellant, to deliver the transcript of testimony to me by May 6, 1968.

6. Cleaveland D. Miller did deliver the transcript of testimony to me during the morning of May 6, 1968 and delivered to me a statement of the cost of the transcript during the morning of May 7, 1968.

7. I believed that the deadline for filing the record in this case was May 10, 1968 and did not realize that such deadline was in fact May 7, 1968. Therefore, although the record was complete and ready for transmittal on May 7, 1968, I made no effort to deliver the record on that date, either by delivering it by hand to the Clerk of the Court of Appeals or by depositing it in the United States mail, as registered or certified mail, postage prepaid, return receipt requested, directed to the Clerk of the Court of Appeals.

8. Again, believing that the deadline for filing the record was May 10, 1968, I waited until May 8, 1968 to file the record because I had prepared a record in another case for filing with the Court of Appeals, which was due May 8, 1968; and I sent both the record in this case and the record in the other case to the Clerk of the Court of Appeals by the same messenger.

9. There was nothing further required to be done by Appellant's attorneys to make the record ready for transmittal to the Clerk of the Court of Appeals by May 7, 1968, and they had done everything required of them in time for the record to be so transmitted on May 7, 1968.

10. The record in this case was not transmitted in a timely fashion to the Clerk of the Court of Appeals because of my belief that the deadline for filing the record was May 10, 1968 and not May 7, 1968.

/s/ FRANK L. ENSOR,
Assistant Chief Clerk,
Superior Court of Baltimore City.

State of Maryland, City of Baltimore, to wit:

I Hereby Certify that on this 15th day of May, 1968, before me a Notary Public in and for the State and City aforesaid, personally appeared Frank L. Ensor, and made oath in due form of law that the matters and facts heretofore stated are true and correct.

As witness my hand and Notarial Seal.

NORMAN ROTHBLOOM,
Notary Public.

(Notary Seal)

AFFIDAVIT OF CLEAVELAND D. MILLER

1. I am one of the attorneys of record for Arnold Constable Corporation, the Appellant herein, and have assisted

in the representation of the Appellant in the trial of this case before the Superior Court of Baltimore City.

2. After the judgment of the lower court against Appellant and in favor of Appellee became absolute on January 24, 1968, I filed with the lower court an Order of Appeal to the Court of Appeals on February 7, 1968. On that same date I also filed an Appeal Bond on behalf of Appellant in the amount of $350,000.00.

3. The lower court, by its order dated January 9, 1967, had referred this case to H. Paul Rome, Examiner-Master, and the testimony of the witnesses herein was presented to the Examiner-Master. The transcript of testimony was taken, on the first day of the hearing, by the office staff of the Examiner-Master and was thereafter taken by Gore Brothers Reporting Company.

4. The records of the lower court, at the times judgment absolute was rendered and an appeal taken, did not contain any transcript of the testimony but did contain a complete set of all exhibits.

5. I presented a Motion to Extend Time for transmitting the record to the Court of Appeals to Judge Joseph L. Carter, who had referred the hearing of the evidence to the Examiner-Master, who had heard all arguments on the Examiner-Master's report and who had filed a Memorandum Opinion, and Judge Carter signed an Order extending the time until April 5, 1968. This Order was filed on February 26, 1968.

6. I presented a similar motion to Judge Carter on April 2, 1968, and Judge Carter signed an Order further extending the time until May 10, 1968.

7. Thereafter, Frank L. Ensor, the Assistant Chief Clerk of the Superior Court of Baltimore City and the clerk who was handling the preparation of the record herein for transmittal to the Court of Appeals, requested me to supply him with a complete copy of the transcript of testimony by May 6, 1968. I had such a copy delivered by hand to him during the morning of May 6, 1968.

8. Mr. Ensor had also requested that I give him a statement of the cost of the transcript, and this I had delivered by hand to him early in the morning of May 7, 1968.

9. All costs required to be paid by Appellant were paid on March 6, 1968.

/s/ CLEAVELAND D. MILLER

State of Maryland, City of Baltimore, to wit:

I Hereby certify that on this 15th day of May, 1968, before me, a Notary Public in and for the State and City aforesaid, personally appeared Cleaveland D. Miller, who made oath in due form of law that the matters and facts heretofore stated are true and correct.

As Witness my hand and Notarial Seal.

/s/ TERESA MANGOGNA,
Notary Public.

(Notary Seal)

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JOHN F. DAVIS, CLERK

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OCTOBER TERM, 1968

No. 560

ARNOLD CONSTABLE CORPORATION,
Petitioner,

v.

EUDOWOOD SHOPPING PLAZA, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 560

ARNOLD CONSTABLE CORPORATION,
Petitioner,

v.

EUDOWOOD SHOPPING PLAZA, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

These proceedings stem from a suit by Respondent, as Landlord, against Petitioner-tenant, for money damages, alleging a breach of a long-term shopping center lease. The Superior Court of Baltimore City, on January 24, 1968, rendered a judgment in favor of Respondent and against Petitioner in the amount of $327,831.97, with interest and costs. Petitioner, on February 7, 1968, took an appeal from said judgment to the Court of Appeals of Maryland.

On February 26, 1968, Petitioner's counsel filed a Motion to Extend Time for transmitting the record to the Court

of Appeals, until April 5, 1968, and an Order thereon was issued simultaneously.

On April 2, 1968, Petitioner's counsel filed a second Motion to Extend Time for transmitting the record to the Court of Appeals of Maryland until May 10, 1968, and an Order to that effect was issued. Rule 825 a of the *Maryland Rules of Procedure* (1957 Ed. as amended) provides that the record on appeal shall be transmitted to the Court of Appeals within thirty (30) days after the first order for appeal is filed; the said rule also provides for extensions of time for such transmittal, but in no event may the lower court "extend the time to a day more than ninety (90) days from the date after the first Order for Appeal is filed . . .".

However, the said Order of April 2, 1968, prepared by Petitioner's counsel and filed in the Superior Court of Baltimore City, extending the time for transmittal of the record until May 10, 1968, did, in fact, extend the time for filing beyond the aforementioned ninety (90) day time limit.

"In reliance upon said Order", (See Appendix C, page 6a-9a, Petitioner's Brief), the Clerk of the lower court and Petitioner's counsel failed to have the record transmitted to the Court of Appeals until May 8, 1968, one day beyond the ninety (90) day time limit.

Petitioner filed the record with the lower court clerk on May 7, 1968, the day it was due at the Court of Appeals, and the clerk, obedient to the requirement as to time contained in the Order, forwarded the record so that it reached the Court of Appeals on May 8, 1968. The Court of Appeals noted that the record was received after the expiration of the time limitation for transmittal, and, on its own motion, dismissed the appeal on May 27, 1968.

Petitioner, contending that the failure to transmit the record within the prescribed ninety (90) day period was

due *solely* to the negligence, omission or inability of the lower court clerk, filed a motion to extend time with the Court of Appeals, attaching thereto affidavits of Frank L. Ensor, Assistant Chief Clerk of the Superior Court of Baltimore City and Cleaveland D. Miller, one of the Petitioner's attorneys. The Court of Appeals, on May 27, 1968, denied Petitioner's Motion, and thereafter Petitioner filed a Motion with the Court of Appeals to rescind the said Order of Dismissal, or, in the alternative, for a rehearing. On June 27, 1968, the Court of Appeals of Maryland likewise denied this Motion.

ARGUMENT

1. Petitioner contends that the action of the Maryland Court of Appeals in dismissing its Appeal, is a violation of one or both of the provisions of the Fourteenth Amendment to the Constitution of the United States, prohibiting the taking of private property without due process of law and guaranteeing equal protection of the laws. As stated by Petitioner in its brief, due process of law has been described as including equal protection of the laws, operating on all alike without discrimination. See *Duncan v. Missouri*, 152 U.S. 377, 382, 14 S. Ct. 570, 572 (1896). Respondent, therefore, in answer to both of these allegations, cumulatively denies that the action of the Court of Appeals of Maryland in any way violates any term of the Fourteenth Amendment to the Constitution of the United States.

Petitioner has not attacked the Maryland Rules of Procedure themselves, but rather the application thereof by the Court of Appeals in the instant proceedings. Petitioner, further, does not contend that the Maryland rule requiring the transmittal of the record on appeal to the Court of Appeals of Maryland within ninety (90) days after the

first order of appeal, is in itself discriminatory class legislation, that it is not sufficiently broad in scope, or that it is an unreasonable time limitation. As stated in *Pfeiffer Brewing Co. v. Bowles*, 146 F. 2d 1006, 1007, (Emer. Ct. App. 1945):

> ". . . [L]egislation must be general in character upon the subjects to which it is related and enforceable in the usual modes adapted to the facts in the case . . . Class legislation discriminating against some and favoring others is prohibitive . . . (but a law which) operates alike on all members of the class, is not special, discriminatory, or class legislation."

By virtue of Article IV, Section 18 of the Constitution of the State of Maryland, the Judges of the Court of Appeals of Maryland are *required* to promulgate rules and regulations for "prosecution of appeals to the appellate courts whereby they shall prescribe the periods within which appeals may be taken . . ."

Petitioner has neither alleged nor proven that the Maryland Rules of Procedure are discriminatory, or, in effect, class legislation; nor does Petitioner contend that other litigants in similar situations are not similarly required to transmit the record on appeal within a given time, in order to perfect such appeal. Petitioner's claim that it was not afforded equal protection under the law is wholly untenable and must fall for want of proof or even an allegation that it was subject to a rule to which others in the same class were not so bound. Petitioner has failed in this respect. See *Rinaldi v. Yeager*, 384 U.S. 305, 86 S. Ct. 1497 (1960).

Similarly, Petitioner's claim that it was deprived of its property without due process of law must fail. It has long been held that:

> ". . . [T]he Federal Constitution does not prevent the states from determining on due notice and oppor-

tunity to be heard, by what process legal rights may be asserted or legal obligations enforced." See *Gelfert v. National City Bank of New York*, 313 U.S. 221, 235, 61 S. Ct. 898, 903 (1941)."

Petitioner has failed to show that the Maryland Rules of Procedure, in and of themselves, denied to it due process of the law. Rather the Petitioner objects to the factual determination made by the Court of Appeals of Maryland that the delay in transmittal of the record on appeal was not solely caused by the negligence, omission or inability of the lower court clerk. It is clear that merely because a litigant is unsuccessful in a proceeding affecting its life, liberty or property, does not necessarily mean that there has been a violation of the constitutional guaranty of due process of the law. See *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 58 S. Ct. 185, 82 L. Ed. 268 (1937).

Respondent submits that due process does not require any specific or particular form or method of procedure, but merely guarantees the regular and orderly mode of procedure by due course of law. See *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 58 S. Ct. 904, 304 U.S. 333, 82 L. Ed. 1381 (1938), and *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 93 (1945).

Petitioner has failed to show that the aforementioned rule of the Court of Appeals of Maryland is a violation of any provision of the Fourteenth Amendment to the Constitution of the United States, and is therefore not entitled to a writ of certiorari based on such alleged violations.

2. The Court of Appeals of Maryland has fairly and reasonably applied the provisions of Rule 825 d of the Maryland Rules of Procedure to the facts of the instant case. The Petitioner contends, however, that the Court's

dismissal of Petitioner's appeal was unsupported by the evidence. Petitioner has failed to demonstrate that the failure to transmit the Record to the Court of Appeals within the time prescribed was solely the result of the negligence of the Court Clerk.

Rule 825 d of the Maryland Rules of Procedure (1957 Ed. as amended) provides:

> "An appeal shall not be dismissed because the record has not been transmitted within the time prescribed, if it appears to this Court that such delay was occasioned by the neglect, omission or inability of the clerk of the lower court, the court stenographer or appellee; provided, however, that such neglect, omission or inability *shall not be presumed but must be shown by the appellant.*" (Emphasis supplied.)

Petitioner erroneously believes that the "uncontroverted evidence" before the Court of Appeals required that body to hold that the delay was caused by the Clerk. However, from the affidavits attached to Petitioner's Motion to Extend Time filed with the Court of Appeals of Maryland, it is clear that the Clerk was not solely responsible, if he were responsible at all.

It is uncontroverted that the Petitioner prepared the Motion and Order Extending the Time for transmittal of the record on appeal to May 10, 1968, a date beyond the ninety (90) day time limit. Further, paragraph 10 of Frank L. Ensor's affidavit states, as follows:

> "The record in this case was not transmitted in a timely fashion to the Clerk of the Court of Appeals because of my belief that the deadline for filing the record was May 10, 1968 and not May 7, 1968."

The Court of Appeals of Maryland has had numerous opportunities to interpret the aforementioned rule. In

Steiner v. Harding, 88 Md. 343, 41 A. 799, 800 (1898) the Court said:

> "The prima facie evidence requiring the court, under its rules to dismiss an appeal, is furnished when the fact appears that more than three months have elapsed between the date of the transmission of the record; and this prima facie evidence must be rebutted and overcome by appellant. He can overcome its effect by showing that the delay was due — first, to the neglect; second, to the omission, or third, to the inability of the clerk. If he fails to establish at least one of these exculpatory circumstances, there is no discretion given this court to entertain the appeal, and the Appellee's right to have it dismissed, secured as it is by the positive terms of the rule, becomes fixed and indefeasible. The rule has the binding force of a statute; and its observance is obligatory on this Court."

To the same effect see *Miller v. Mencken*, 124 Md. 673, 93 A. 219 (1915), wherein, the Court further held that the Appellee need not offer any proof, if the Appellant has failed to discharge the burden of proof. The Maryland Court of Appeals has also held that the fact that the delay is only for one day has no bearing on the rule, for the application of the rule cannot be made to "depend upon a mere measurement of the extent to which it has been transgressed." See *Horseman v. Forbush*, 124 Md. 581, 93 A. 149, 151 (1915).

These same principles were only recently affirmed by the Maryland Court of Appeals in *Agnoli v. Powers*, 235 Md. 289, 201 A. 2d 487 (1964), and *State Roads Commission v. Maryland Materials, Inc.*, 237 Md. 621, 205 A. 2d 796 (1965).

It is clear from the authorities above cited that Petitioner must affirmatively prove that the delay in transmittal was caused solely by the negligence, omission or inability of the Clerk. There is no evidence in the record which could logically support Petitioner's allegations.

Moreover, it has been held recently that an Order of a lower court, purportedly extending the time for filing the record on appeal beyond the number of days permitted by statute is null and void, and an appeal filed based on such order will be dismissed. See *First Finance Company v. Ross*, 211 N.E. 2d 588, 64 Ill. App. 2d 474 (1965), and *Ramsay v. Boland*, 364 P. 2d 824 (Wyo., 1961).

Following these decisions to their logical conclusions, Petitioner's failure to transmit the record on appeal to the Court of Appeals could not possibly be blamed on the lower court clerk.

The said Order of court dated April 2, 1968, extending the time for filing the record beyond the ninety (90) day limit being a nullity, the Petitioner's brief was therefore due at the Court of Appeals on April 5, 1968, and the alleged error of the clerk in May of 1968 is meaningless.

In either event, whether Petitioner's brief was due on April 5, 1968 or May 7, 1968, Respondent submits that in no way can the delay be due to the lower court clerk's negligence, but rather the Petitioner must bear the full responsibility and ultimately the consequences of the illegal and improper order obtained by Petitioner.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Court of Appeals of Maryland should be denied.

Respectfully submitted,

ROBERT L. SULLIVAN, JR.,
Counsel for Respondent.

STEIN, ABRAMS & ROSEN,
Of Counsel.

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent's Brief in Opposition fails to refute the overwhelming showing made by Petitioner that the Maryland Court of Appeals has unconstitutionally closed its doors to Petitioner.

The following propositions are entirely undisputed:

1. Petitioner was required under Maryland law to proceed through the agency of the lower court clerk (Superior Court of Baltimore City) in causing the Record on Appeal to be transmitted to the Maryland Court of Appeals at Annapolis. That forum is the court of last resort in the

State of Maryland, there being no intermediate appellate level (Maryland Rule of Procedure 825, Pet. App. p. 1a).

2. It is the function of the clerk of the lower court to transmit the record, and no other person has the power to do so.

3. The record was lodged with the clerk of the lower court (Frank N. Ensor, see Pet. App. C, p. 6a) in time for timely transmittal to the Maryland Court of Appeals either by hand delivery or mailing.

4. Mr. Ensor, Assistant Chief Clerk of the Superior Court of Baltimore City, adopted neither course, but waited until the following day so that his messenger could hand deliver this and another case record together, and "kill two birds with one stone". This method employed, through no fault of Petitioner, boomeranged and has this far operated to kill Petitioner's appeal.

Respondent's opposition brief seeks to stifle Petitioner's access to the Maryland Court of Appeals by focusing upon the second order issued out of the Baltimore Superior Court, which extended Petitioner's time to cause transmittal of the record under Rule 825(b) of the Maryland Rules of Procedure (Pet. App. 2a). Respondent appears to argue (opposition brief, pp. 2, 6) that because Petitioner's counsel did not prevent the lower court from entering an order of extension three days in excess of the ninety day interval prescribed by the Maryland Rules, Petitioner's rights of appeal have been constitutionally snuffed out. This argument is untenable under constitutional principles thoroughly established under the Fourteenth Amendment.

Petitioner, a corporation foreign to the State of Maryland, has been denied "the equal protection of the laws" within the meaning of the Fourteenth Amendment since other litigants (similarly situated as Petitioner in falling

victim to the default or miscarriage of Maryland lower court clerks have been regularly granted relief and their appeals have been heard on the merits (see Pet., p. 7).

Respondent has entirely misapprehended the thrust of Petitioner's argument with respect to denial of equal protection. Whereas " 'The Equal Protection Clause' requires more of state law than non-discriminatory application within the class it establishes," *Rinaldi v. Yeager*, 384 U.S. 305, 308 (1966) (cited by Respondent Brief, p. 4), it surely does not require less. The law must be evenly applied to all similarly situated persons, and the class itself must be rationally and fairly established. *McLaughlin v. State of Florida*, 379 U.S. 184, 191 (1964). Petitioner does not contend that the Maryland Rules, in and of themselves, have withheld equal protection of the laws of Maryland from Petitioner; rather Petitioner does urge that the application of such rules in this case has resulted in a discriminatory, and therefore unconstitutional, denial of equal protection. The constitutional test which Petitioner invokes is well expressed in *Republic Pictures Corp. v. Kappeler*, 151 F. 2d 543, 547 (8th Cir. 1945), *aff'd*, 327 U.S. 757 (1946), reh. den. 327 U.S. 817, as follows:

> "Equal protection of the law in its constitutional sense implies that all litigants similarly situated may appeal to the court for relief under like conditions and without discrimination."

This is the standard under which the treatment of Petitioner by the courts of Maryland must be measured under the Fourteenth Amendment, and is to be found wanting in this case. See also, *Swick v. Glenn L. Martin Co.*, 68 F. Supp. 863 (D. Md. 1946), *aff'd*, 160 F. 2d 483 (4th Cir. 1947), cert. den., 332 U.S. 772 (1947).

While Respondent struggles to reapportion the blame for the default of the lower court clerk so as purportedly

to include Petitioner's Maryland counsel and their supposed role in obtaining the second extension order from the lower court judge who signed the order (regardless of who submitted it), the real and only damage is being inflicted upon Petitioner itself, who all must agree is entirely blameless. Respondent twice misstates (Brief, p. 6) the burden imposed upon Petitioner ("appellant") by Rule 825(d) of the Maryland Rules of Procedure, as requiring a demonstration that the one day delay in transmitting the record was "solely as the result of the negligence of the Court Clerk." This introduction of "solely" is simply a gloss upon the Rule, added gratuitously by Respondent; the Rule itself contains no such explicit requirement. Thus, even if it be the cumulative errors below, which have thus far deprived Petitioner of its substantial rights of appeal, such error lies wholly within the judicial machinery of the State of Maryland.

The merits of Petitioner's appeal were presumed by the Maryland Court of Appeals under its practice and at the present juncture its appeal from the substantial judgment cannot be heard. This miscarriage of justice is a denial of equal justice under law. As the district court so aptly expressed it in *U. S. v. First Nat. Bank & Trust Co. of Lexington, Ky.*, 280 F. Supp. 260, 263 (E.D. Ky. 1967) (previously considered and remanded at 376 U.S. 665 (1964)):

> "*Equal justice under law* means that any court action, whether civil or criminal, should be a satisfying experience to each litigant; not that each litigant would be satisfied with the results, but *satisfied that his rights have been thoroughly and objectively considered.*" (Italics added.)

Surely it cannot be said that Petitioner herein, whose appeal has been so unfairly and summarily dismissed, has received equal justice under law, where its rights have not

even been heard, much less "thoroughly and objectively considered".

Of course, denial of equal justice under law, or what is the same thing, equal protection of law, can also result, as is the situation herein, in denial of due process of law. As the Court held in *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954):

> "But the concepts of equal protection and due process, both stemming from our American ideal of fairness are not mutually exclusive."

CONCLUSION

The dismissal of Petitioner's appeal, because of the miscarriage of the judicial establishment of the State of Maryland, and through no fault of Petitioner, has resulted in the denial to Petitioner of equal protection of law, and due process of law.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

NORMAN P. RAMSEY,

Counsel for Petitioner.

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PETITIONER'S PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

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PETITIONER'S PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a rehearing upon its petition for certiorari to the Court of Appeals of the State of Maryland following the order of this Court dated December 9, 1968, denying such relief.

In compliance with Supreme Court Rule 58(2), Petitioner submits the following as substantial additional grounds, not previously presented, for the granting of the writ.

Prior Proceedings

At the outset, it must be emphasized that this is not the commonly encountered case of an unsuccessful litigant seeking to reinstate an appeal by escaping or excusing the

consequences of some delinquency or oversight attributable to the *litigant himself*. Here Petitioner has been cast out of court, and denied equal access to and protection of law, solely by the *mistakes and miscarriages of a state's own judicial machinery*. Petitioner (appellant below) fully complied with the appellate rules and procedures of the State of Maryland, but the subsequent errors of the state's judicial machinery have been artificially charged to Petitioner so as to extinguish its rights of appeal.

In its petition and reply brief heretofore filed herein, Petitioner urged that dismissal of its appeal from a $350,000 adverse judgment by the Court of Appeals of Maryland resulted in the denial of equal protection of law and due process of law under the 14th Amendment. The uncontroverted facts show that Petitioner (as required under Maryland law) made timely filing of the record on appeal with the clerk of the lower court in Baltimore City where the *nisi prius* judgment had been rendered.

It was also uncontroverted that the lower court clerk delayed, for reasons of his own convenience, one extra day before transmitting the record to the Court of Appeals at Annapolis, Maryland, and that this delay resulted in exceeding by such one extra day the ninety-day limit fixed for the lodging of such appellate records in the Court of Appeals of Maryland under the Maryland Rules of Procedure. Despite the statutory power of the Maryland Court of Appeals under the State Rules (Rule 825(c), printed at Appendix Page 2a of Petition) to reinstate and entertain any appeal where "the failure to transmit the record was occasioned by the neglect, omission or inability of the clerk of the lower court . . .," the Maryland Court of Appeals granted Respondent's motion to dismiss this appeal for untimely filing, and thereafter refused to reconsider or rescind its order of dismissal (App. Page 5a).

Uncontested by the Respondent was the sworn statement of the clerk of the lower court that the sole reason for the inadvertent one-day delay was his own mistake, misled as he was by the order by the judge of the *same* lower court extending Petitioner's time to transmit the appellate record three days beyond the legal ninety-day limit. Also uncontroverted by Respondent was the further sworn statement by the clerk that Petitioner's counsel made timely compliance with all his requests to furnish the transcripts of the testimony, statements of cost, etc. (App. pp. 6a-7a).

Grounds for Rehearing

Obviously Petitioner stands in this Court as the victim of an unconscionable miscarriage of justice, resulting from mistakes imposed upon Petitioner by Maryland's judicial machinery, and a Draconian application by the Maryland Court of Appeals of the State Rules of Procedure. A rehearing is respectfully requested in the light of this Court's decision in *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) where this Court (citing *United States v. Ohio Power Co.*, 353 U.S. 98 (1957)), held that it would disregard, and indeed reject the absolute language of Supreme Court Rule 58(4) (to the effect that successive petitions for rehearings will not be received), when fundamental justice required a holding to the contrary. In *Gondeck* this Court concluded that the interests of basic fairness and justice must take precedence over "the strict application of our Rule," and after a prior denial of certiorari, and outright dismissal of a first petition for rehearing, granted plaintiff's second rehearing petition, and thereupon reversed the lower court.

Rehearing is also sought in view of this Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 392 U.S. 657, 88

S. Ct. 2279 (1968), where this Court swept aside the holding of the Supreme Court of Appeals of Virginia (which had dismissed an appeal on the technical grounds that it had not been fully perfected under state rules) because the important constitutional rights announced in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S. Ct. 2186 (1968), had been left unconsidered by the state court. In directing the Supreme Court of Virginia to entertain that appeal on the merits, this Court manifested its fundamental view that substantial justice and constitutional rights are not to be strangled in a web of procedural considerations which defeats substantial justice. The later recalcitrance of the Virginia Court of Appeals in moving to a consideration of the merits, reported at 163 S.E. 2d 588 (Oct. 14, 1968) scarcely vitiates this salutary rule. No similar repudiation of this Court's mandate, if it should reverse and remand this case, could be anticipated herein, since the very constitutional principle at stake is the state court's refusal to hear the within appeal on its merits.

The instant petition for rehearing invokes a similar appeal to fundamental criteria of fairness and substantial justice, as deserving of decisive weight against the rigid adherence to technical formalism herein by the Maryland Court of Appeals. Surely if an explicit rule of this high Court must bow to fundamental requirements of fairness and substantial justice, a state procedural rule casting Petitioner out of court, which was discriminatorily applied to Petitioner, must also (as in *Sullivan v. Little Hunting Park, Inc., supra*) yield to the same compelling demands. As this Court so aptly stated in *Hormel v. Helvering*, 312 U.S. 552, 557 (1941):

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

Unfortunately, this case stands presently as a monument to precisely the opposite philosophy. Petitioner and its constitutional rights have thus far been wholly sacrificed to the grimmest and most rigid application of the Maryland Rules of Procedure pertaining to appeals. The total dismissal of Petitioner's appeal to the Court of Appeals of Maryland is all the more shocking in view of the circumstance that such dismissal resulted from errors and miscarriages entirely and solely within the control of the judicial establishment of the State of Maryland, and that Petitioner and its Maryland counsel fully complied with those rules, except insofar as compliance was frustrated by the judicial establishment.

The Federal courts have been alert to redress an inflexible and literal application of the Federal Rules of Civil Procedure if an injustice thereby results. See, *e.g. Steinberg v. Indemnity Insurance Company of America*, 36 F.R.D. 253 (E.D. La., 1964). And as Justice Cardozo wrote over fifty years ago before joining this high Tribunal, and then still a member of the highest court of New York State:

> "The law has outgrown its primitive state of formalism when the precise word was the sovereign talisman, and every slip was fatal." *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91 (1917).

The tragic irony presented half a century later by the case at bar is that the slips (and slip-ups) of Maryland's own judicial machinery have proven "fatal" to Petitioner, not through any fault of its own. Yet the highest Maryland Court, with what can only be viewed as endorsement of a primitive legal fiction, has thus far closed the courthouse doors to Petitioner's appeal, in disregard of Petitioner's constitutional rights.

Such an outcome of this action is surely not to be countenanced today, in what is universally regarded as a more enlightened era of the law.

Conclusion

For the foregoing reasons, the within petition for a rehearing should be in all respects granted, and the writ of certiorari should issue.

Respectfully submitted,

NORMAN P. RAMSEY,
Counsel for Petitioner.

Dated: December 31, 1968.

CERTIFICATION OF COUNSEL

State of Maryland, City of Baltimore, to wit:

I, the undersigned, counsel to Petitioner in the above-captioned cause, duly certify in accordance with Supreme Court Rule 58(2), that this Petition for Rehearing is presented in good faith and not for delay, and I further certify that the within Petition is restricted to substantial grounds available to Petitioner not previously presented in this Court.

NORMAN P. RAMSEY,
Counsel for Petitioner.